IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.627 OF 2005

Rajesh Gajanan Vaidya]
Age 41 years, Occ. Service,]
R/at Nw-D, 6/2, Eklahara] Appellant
Colony, Nasik Road, Nasik] (Org.Accd No.1)
Presently in Nasik Road Central]
Prison, Nasik.]

versus

The State of Maharashtra] Respondent.

Mr.Ramrao Adik, Sr.Counsel with Mr.M.S.Mohite and Mr.Sachin Kadam i/by Mr.Indrajeet Joshi for the appellant.

Mr.A.S.Shitole, APP, for the State.

CORAM : D.G.DESHPANDE
SMT.NISHITA MHATRE, JJ.
DATED : JUNE 12, 2007.

JUDGMENT : [PER D.G.DESHPANDE,J]

1. This appeal is filed by the original accused No.1 against the judgment and order of III Adhoc Addl.Sessions Judge, Nashik dated 6th May 2005 by which he was convicted under Section 302 of the Indian Penal Code and was sentenced to suffer life imprisonment and to pay fine of Rs.2000/- in default to suffer S.I. for three months. There were other accused i.e. Accused Nos. 2 to 5. But they were acquitted and there is no State appeal against that acquittal.

2. The prosecution case is that the accused killed his wife by burning her after 12 years of marriage. FIR in this case was lodged by P.W.1 - Sandhya Vanjalkar - the mother of victim Kalindi, who was initially staying at Amaravati and when she came to know about the incident, she came to Nasik where the accused was residing and then, she lodged the FIR on the basis of suspicion. According to the mother of Kalindi, the accused were ill-treated Kalindi because she was not having a child and they were asking for money repeatedly. The case about murder is based on

circumstantial evidence and, the circumstance, being the presence of this accused in his house only at the time when Kalindi caught fire in the gallery and suffered 96% burn and died on the spot.

3. We heard learned Senior Counsel Mr.Ramrao Adik for the accused and learned APP Mr.Shitole for the State.

4. According to learned counsel Mr.Adik for the accused, there is absolutely no evidence to connect the accused with the offence of murder. Firstly, the case of the prosecution about ill-treatment by the accused for the demand of money is totally disbelieved by the trial Court. Secondly, two months before the incident, Kalindi had delivered a female child and therefore, there was no cause or grievance of the accused that Kalindi was not capable of rearing any child. The child delivered by the Kalindi was the test tube baby after 12 years of marriage and, there was no reason for the accused to commit murder. Thirdly, according to learned counsel for the accused, the prosecution case that kerosene was used by the accused for burning Kalindi is

totally disproved by the Chemical Analyser's report, because in that report the C.A. did not find any residue of kerosene on the articles seized from the spot nor in the panchanama of scene of offence anybody smelt kerosene on the spot. Learned counsel Mr.Adik drew our attention to the findings of the trial Court in Para 29 in this regard favouring the accused. Learned counsel Mr.Adik further pointed out that the doctor who performed the autopsy on the body of Kalindi could not give his definite opinion whether the burn injuries to the extent of 96% were anti-mortem or post-mortem. Our attention was also drawn in this regard to para 36 of the judgment of the trial court and the doctor's opinion. The doctor's opinion was that the injuries were probably antemortem.

5. In this background, the learned counsel Mr.Adik for the accused, therefore, contended that on such evidence the trial court could not have convicted the accused at all and the accused was entitled for acquittal.

6. As against this, the learned APP for the State urged that the conduct of the accused

revealed his guilty mind and even though he was present in the house, he did not make any attempt to extinguish the fire and save his wife. He further contended that there was no reason to interfere with the judgment of conviction and, therefore, he prayed that the appeal should be dismissed.

7. We have given our anxious consideration to the submissions made by the learned counsel for the accused and the learned APP for the State. The trial Court has framed three questions or points for determination and the 1st point was, whether the accused have subjected Kalindi to cruelty by harassing to coerce her parents to meet unlawful demand of dowry and thereby they have committed an offence under Section 498-A r/w 34 of the Indian Penal Code. The finding of the trial Court in this regard is in the negative i.e. in favour of the accused. In this regard the trial court had considered the oral evidence of (PW 1) the mother of Kalindi, the twelve years matrimonial life which Kalindi and accused lived together, the correspondence exchanged between the parties (Exhibits 41 to 54) and, came to specific and clear-cut conclusion

that this was not a case at all where the accused could be held guilty of any offence under Section 498A of the Indian Penal Code. These findings are fully consistent with the evidence. Even in the FIR, lodged by the mother (PW 1), there are no allegations supporting the contentions and the case of P.W.1 that she went on fulfilling the demands was found to be unreliable. Because even though P.W.1 has stated that she paid certain amounts to the accused by cheques, P.W.1 could not produce any bank statement or bank account or any other document to support her contention. The evidence of other witnesses i.e. the relatives of P.W.1 was considered by the trial Court. They had no personal knowledge about those demands. Therefore, we do not find that the trial Court has committed any mistake in coming to the aforesaid conclusion with reference to the offence under Section 498-A of the Indian Penal Code.

8. If the offence under Section 498-A of the Indian Penal Code does not withstand the test of scrutiny, then simple question would be, why the accused, after twelve years of marriage and when his wish or desire to have a child was fulfilled

by Kalindi may be having test tube baby, would kill or murder his wife Kalindi. The accused was residing in MSEB quarters. There were many residents occupying those quarters. But none of them has stated anything about the motive of the accused to kill Kalindi. No doubt the accused was in the house at that time but that in itself cannot be a circumstances to raise signal of suspicion about the accused. The explanation of the accused was that cow dung cakes were burning and kept in the gallery. They were used to give warmth to newly born child as those were rainy days in Nasik. Kalindi went in the gallery for spreading the wet clothes on the rope fixed in the said gallery for drying the clothes. The cow dung cakes were burning, the smoke was coming out, she fell on the cakes and became unconscious because of carbon-monoxide emitted by burning of cow dung cakes and she caught fire. Admittedly, no kerosene was used intentionally or accidently in burning the body of Kalindi. Nobody had seen the accused who saw Kalindi on burning cow dung cakes.

9. The fact that cow dung cakes were kept in the gallery is proved because one gunny bag was

found there. Ash of cow dung cakes was also found on the cakes. The FIR is based on suspicion or doubt as per the finding of the trial Court. The doubt or suspicion has no foundation and P.W.1 could not make out any case in that regard against the accused. The house of the accused is on the ground floor with gallery admeasuring 10 x 5 ft. having windows and door to the entrance. Looking to the fact that it is a part of complex occupying by the MSEB employees and the fact that it was a day time, if the accused had pushed Kalindi in the fire, somebody would have been there to witness the incident.

10. Therefore, this is a case where the trial court came to the positive conclusion that nothing is proved against the accused under Section 498-A of the Indian Penal Code, there is no motive for the accused to kill Kalindi, thirdly, the accused and Kalindi had spent 12 years of married life together and the letters of Kalindi are full of praise about the accused with no complaint of any kind about the so called ill-treatment, the accused was gifted with the child two months before the incident and in such circumstances if the accused wanted to burn

Kalindi alive without using Kerosene only by using burning cow dung cakes, Kalindi would not have suffer 96% burn, there would have been resistance on her part or shouting or crying and there would have been attempts to rescue her.

11. In the post-mortem notes, it was found that the trachea and bronchi were having deposition of soot and both the lungs were found oedematous and blood strained froth extruded out. The doctor admitted that this condition was possible only in case of severe coughing due to suffocation caused by inhaling of the thick and de-oxygenated smoke. The dead body was found as per the map in North-East corner of the gallery and the remains of cow dung cakes were also found there. In this background, therefore, it could not be said that the prosecution has succeeded in proving that the accused was guilty of murder.

12. Basic principle of criminal law is that the prosecution must succeed or fail on its own strength. If the doctor, who performed post-mortem, could not concluded whether the injuries were antemortem or post-mortem, then it was not at all proper for the trial court to

convict the accused for the offence of murder. Possibility of injuries being antemortem as per the evidence of Dr.Rajendra Pagare (PW 6) cannot take place of proof beyond reasonable doubt. P.W.6 Dr.Pagare clearly admitted that there was no smell of kerosene on the body and it was true that one may receive excessive heat even if cow dung cakes were burning without flames. The defence of the accused that he had a meal with Kalindi at 12 'O' clock is corroborated by the admission of the doctor (PW 6) that the undigested food i.e. semi solid food was in the stomach of the deceased.

13. In para 49 of the judgment, the trial Court has observed as :-

> "Considering the peculiar circumstances and the facts that the circumstances of this case mainly that death of victim had occurred in the house of accused no.1, who is wife and that too by sustaining burn injuries and it is instant death during the day time and in the MSEB quarter at Eklahare, Nasik situated on the ground floor. And at that time the

> accused nos 1 and 4 were present in the house and they are husband and mother-in-law of deceased. The defence evidence, explanation under section 313 of Cr.P.c. are having such importance considering the provision of section 106 and 114 of Indian Evidence Act. This section 106 of the Act is exception to Sec.101 of the Indian Evidence Act and sec.106 of Indian Evidence Act is not attracted unless initial burden of the prosecution to prove the guilt is discharged. And considering the above all the discussion and in the facts and the circumstances, it is clear that Sec.106 of the Indian Evidence Act is attracted."

In para 50 of the judgment, the trial Court says that it is clear that there was no reason for deceased victim to commit suicide, The victim had died on the spot due to extensive deep burn injuries immediately. Admittedly, she had not shouted and she had not tried to save her life, The accused No.1 and other acquitted accused No.4 were present in the room, but they did not try to

save the victim, Empty kerosene can was seen on the spot. Accused No.1 came to be held guilty even though in para 51, the trial Court observed that the prosecution had failed positively to prove the motive of the accused in murdering the victim. The circumstances, that are held against the accused for convicting him by the trial court are his presence in the house at the relevant time and his failure to save his wife. These cannot be the circumstances to hold the accused No.1 guilty. The judgment is totally perverse and, therefore, this appeal is required to be allowed. We, therefore, pass the following order:-

:ORDER:

Appeal is allowed.

Conviction of appellant/original accused No.1 under Section 302 of the Indian Penal Code and the sentence imposed upon him is set aside.

The appellant/original accused No.1 be released forthwith if not required in any

other case.

If the appellant/original accused No.1 has paid the fine, the same should be refunded to him immediately.

Appeal is disposed of accordingly.

[D.G.DESHPANDE,J]

[SMT.NISHITA MHATRE, J]